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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

MAR 29 1993
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of

Implementation of Section 26 of the
Cable Television Consumer Protection
and Competition Act of 1992

Inquiry into Sports Programming
Migration

PP Docket No. 93-21

COMMENTS OF RAINBOW PROGRAMMING HOLDINGS, INC.

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Prime SportsChannel Networks, and Prism, a premium sports and movie service serving the Philadelphia market.^{3/} Rainbow's SportsChannel services provide regional telecasts of professional teams based in New York/New Jersey, Philadelphia, New England, Chicago, Cincinnati, Cleveland, San Francisco/Oakland, and

broadcasters. To the contrary, cable programmers^{1/} have created an "electronic stadium" that provides consumers with access to sports programming that never would have been shown on broadcast television. Cable programmers have undertaken substantial financial risks to bring additional sports programming to viewers. They were the first to bring home games to television on a widespread basis, but only after guaranteeing to team owners that they would cover lost gate revenues. They have often been the only outlets for colleges and fledgling professional teams that lacked established audiences. In the New York market, for instance, the hundreds of games of nine professional teams and dozens of colleges simply cannot be accommodated on the two independent television stations that have historically served as outlets for sports programming. Cable programmers have also been willing to exhibit games that broadcasters chose not to carry. The result has been an increase in the quantity and the quality of sporting events available to television viewers.

Non-network broadcasters retain substantial leverage in negotiations for sports programming rights. A broadcaster's 100 percent household penetration and its free government-granted license more than compensate for the broadcasters' historic lack of a "second revenue stream." Generally, broadcasters' ad revenues have exceeded the revenues that regional SportsChannel

^{1/} While the terms "cable programming" and "cable programmers" are used herein, Rainbow's sports programming is made available through all subscription media.

services receive from advertising and subscriber fees combined.

On occasion, team owners have protected broadcasters' substantial advertising revenues from competition from cable. The 1992 Cable Act confers additional advantages on broadcasters seeking to bid for sports programming rights, by authorizing them to demand


retransmission consent fees and exempting them from the

have access to less sports programming and team owners and schools will have access to less revenue. While broadcasters might be aided by a policy that prevents cable programmers from effectively competing for audience share, the public interest would not be served by such a reduction in competition in the video marketplace and the resulting decline in the quantity and quality of sporting events and sports programming.

I. BROADCASTERS DO NOT COMPETE AT A DISADVANTAGE FOR SPORTS PROGRAMMING RIGHTS

The misconception that sports programming has "migrated," or has been "siphoned," from broadcast to subscription television implies that broadcasters have been at a disadvantage in the marketplace.^{8/} The legislative history indicates that Congress was specifically concerned that broadcasters have been disfavored by the fact that they bid for sports rights based only on one revenue stream (advertising), while cable programmers bid based on two sources of revenue (advertising and subscriber fees).^{9/}

In fact, broadcasters have never been disadvantaged in the bidding process for sports programming rights. Broadcasters have



always possessed significant negotiating leverage in the sports programming marketplace, and their leverage has been enhanced by the enactment of the 1992 Cable Act.

By their very nature, broadcasters have substantial advantages in bidding for any programming, including sports rights. Unlike cable programmers, who reach only 60 percent of television households nationwide when carried on the basic service tier (and even fewer households when carried on higher tiers or on premium or pay-per-view channels), broadcasters have

access to 100 percent of households. Because team owners often

[REDACTED]

programmers. For instance, the advertising revenues received by one non-network station were such that the station was able to pay approximately twice as much as SportsChannel for the rights to broadcast the games of a major league baseball team, despite Rainbow's "dual revenue stream."^{11/} A broadcaster's revenue stream is often sufficient to enable the broadcaster to sign teams on the basis of revenue sharing arrangements that involve little financial risk to the broadcaster. SportsChannel, by contrast, must commit to pay predetermined rights fees in order to obtain sports programming. The amount of the rights fees that SportsChannel is able to pay, moreover, is often less than a broadcaster in the same market can offer through a revenue sharing arrangement. In fact, SportsChannel's advertising revenues exceed the sum of the rights fees and production costs with respect to only one professional team of the more than 20 with which SportsChannel has agreements.

The growth of superstations has given independent broadcasters an additional advantage over regional sports services like SportsChannel. Superstations can sell national spot ads at far higher rates than can regional sports services, whose audience reach is generally limited to metropolitan areas. SportsChannel now faces competition from superstations for sports rights in New York and Chicago.

^{11/} The advertising revenues available to cable sports programmers is significantly limited by the multi-channel nature of cable service, which causes cable advertising dollars to be fragmented among dozens of competing programming services.

Rainbow has also found that team owners and sports rights holders have on occasion sought to protect broadcasters' advertising revenues by preventing cable programmers from competing for these revenues. For example, in one market, two professional sports teams agreed not to permit cable carriage of more than 25 percent of their games in an effort to prevent the dilution of broadcasters' advertising revenues. In a further effort to protect those revenues, both teams requested that SportsChannel carry their games on a premium channel. In other instances, SportsChannel has had to agree not to sell advertising time for particular products in order to gain sports programming rights.

Even assuming arguendo that broadcasters have been disadvantaged in the past, enactment of the 1992 Cable Act guarantees that broadcasters will not be disfavored in the sports programming marketplace in the future. To the contrary, the Act actually tilts the playing field further in favor of the broadcasters. By permitting broadcasters to collect fees for granting retransmission consent to cable operators,^{12/} the Act makes available to broadcasters another substantial revenue stream. Combined with the inherent advantages and sizable advertising revenues described above, this new revenue stream enhances the broadcasters' ability to consistently outbid cable sports programmers.

^{12/} 47 U.S.C. § 325(b).

Additionally, the Act's provision requiring that cable operators place all of the system's broadcast signals (including those carried pursuant to retransmission consent) on the basic service tier^{13/} enhances the broadcasters' negotiating leverage with sports rights holders. Carriage on the basic tier provides broadcasters with maximum viewer exposure and, in turn, with increased advertising revenues. As a result, broadcasters can offer sports teams both a favorable channel position and a higher price for their programming rights than any cable programmer could. In view of these combined advantages, which effectively propel broadcasters into the front ranks of cable programmers, there is no basis for guaranteeing broadcasters access to particular games or providing them with any other special benefits.

II. THE COMMISSION'S ANALYSIS OF SPORTS PROGRAMMING MUST EXAMINE THE DYNAMICS OF THE VIDEO MARKETPLACE AS A WHOLE

In a marketplace where broadcasters hold the edge over cable programmers in bidding for sports programming rights, cable programmers have obtained such rights not by "siphoning" programming away from broadcasters, but by responding aggressively to a variety of legitimate market forces. Cable programmers have often taken significant financial risks to provide viewers with access to games of fledgling teams and other sports programming that was otherwise unavailable to viewers. In

^{13/} 47 U.S.C. § 543(b)(7)(A)(iii). The Act does not require operators to carry any cable programming services on the basic tier.

a number of cases, Rainbow and its predecessor companies have provided the revenue and built the community support necessary to attract expansion teams and to enable them to become league contenders.

Rainbow and other cable programmers have also brought games to the viewing public that broadcasters either were unwilling or

telecast.^{14/} In some cases, SportsChannel has brought home games to television for the first time. In other cases, SportsChannel was the first outlet for expansion teams that had little or no television exposure prior to signing with Rainbow.

The efforts of Rainbow's chairman, Charles F. Dolan, exemplify cable's long-standing commitment to bring new sports programming to the public. In the late 1960s, when cable was in its infancy, Manhattan Cable, then operated by Dolan, sought the permission of Madison Square Garden (MSG) to telecast all home play-off games of the New York Knicks and Rangers. At that time, MSG did not allow the broadcast of home games because of concern that televised coverage would diminish gate revenues. Manhattan Cable received permission to telecast the home play-off games only after promising to pay MSG for reduced ticket sales.

Manhattan Cable's promise led to an agreement the next year allowing cable carriage of all home games, which in turn led to the creation of the Madison Square Garden Network. Through the efforts of cable, Knicks and Rangers home games became available to viewers at home for the first time.

Even today, programmers are sometimes asked to agree to guarantee a level of gate revenues to obtain the rights to exhibit home games not previously telecast. Team owners remain

^{14/} SportsChannel and Prism have expanded the range of sports programming to include never-televised games of the New York Islanders and Mets, New Jersey Nets and Devils, Chicago Blackhawks, San Francisco Giants, Oakland A's, Cleveland Cavaliers and Indians, Cincinnati Reds, Hartford Whalers, and Philadelphia Phillies, 76'ers and Flyers.

concerned that televised coverage will decrease box office sales. In one market, for instance, SportsChannel is required under certain circumstances to compensate team owners for a portion of lost gate revenues stemming from telecasts of home games. Likewise, cable programmers have on occasion stepped forward to purchase the rights to most or all of a team's games,^{15/} rather than cherry-pick the high-grossing popular sports events as broadcasters do. Such an investment is especially risky when a team is either new or unsuccessful and needs revenues from television exhibition just to survive.

SportsChannel's relationship with the New York Islanders illustrates how cable programmers have encouraged the growth of sports teams as well as sports programming. In 1975, when they first began playing, the Islanders were unable to secure broadcast coverage for more than a handful of games. Even though the team lacked significant fan or other support, Cablevision agreed to pay for all of the games not broadcast. Despite the fact that Cablevision operated only on Long Island, moreover, the company purchased the rights to the entire New York City metropolitan area at the team's insistence. The revenues

^{15/} Because there is always a premium paid for exclusivity, team owners may prefer to sell all of their rights to one medium.

provided by the team from cable sources helped them measure and

[REDACTED]

event, and chose those events (e.g., men's basketball) that they thought would attract the largest audience share.

B. THE AMOUNT OF SPORTS PROGRAMMING AVAILABLE ON BROADCAST STATIONS IS IN LARGE PART A FUNCTION OF DECISIONS BY THE BROADCASTERS THEMSELVES

Even though broadcasters have had the ability to compete for sports programming rights, they often have chosen not to do so. This is explained by several factors, beginning with the vastly different nature of broadcasters and sports programming services. The service provided by broadcasters is aimed at attracting the largest possible audience. Thus, broadcasters spend money to develop or acquire a mix of programming designed to maximize

audience share and revenues. Because sports programming is

SportsChannel.^{18/} An independent broadcaster with superstation status would have even more resources with which to compete with a cable sports programmer for sports rights.^{19/}

Broadcasters also restrict their coverage of sporting events because sports programming preempts their regularly scheduled programming. Broadcasters are extremely reluctant to disrupt a scheduled block of programming, since it interferes with their efforts to build viewership for that block.^{20/} In addition, by limiting the number of sports events they carry, broadcasters can maximize the advertising revenues they receive for such events.

Rainbow's SportsChannels have provided viewers with access to sports programming in numerous situations where teams could not secure adequate broadcast coverage. For example, for four years (the 1988-89 season through the 1991-92 season), Rainbow's SportsChannel America held the national rights to all National Hockey League ("NHL") games in partnership with NBC. In the first year, NBC did not clear any games for carriage. During

multiple games three times a week. Had it not been for carriage by SportsChannel America, there would have been far less coverage of hockey's regular season or play-off games.^{21/}

Similarly, in the New York market, Rainbow has found broadcasters to be generally unwilling to purchase sports programming rights available to them.^{22/} The New Jersey Nets, for instance, which are carried by SportsChannel New York, retained the rights to sell 15 regular season games to broadcasters during each season between 1986-87 and 1991-92, but were unable to place any games on broadcast television during the first four of those seasons. In each of the last two of those seasons, they placed only six games on television. This season, SportsChannel and the Nets agreed to put ten away games on broadcast television. The broadcaster refused to pay a guaranteed rights fee for the games, agreeing only to share a proportion of its advertising revenues with the team and SportsChannel.

In several markets, SportsChannel has obtained programming rights previously held by broadcasters. For example, in the New York market, a broadcaster's decision to reduce carriage of the

^{21/} SportsChannel America did not create the Minnesota North Stars' pay-per-view package. Cf. Notice at ¶ 17 (requesting information on this package). SportsChannel's contract with the NHL reserved to each team decisions about coverage of all games in their home territory. The North Stars, not SportsChannel, opted for pay-per-view.

^{22/} Only two independent VHF stations in New York, WWOR and WPIX, have been willing to carry local teams. Historically, WPIX has carried only the New York Yankees.

New York Islanders in the early 1980s permitted SportsChannel to acquire an option for exclusive rights to the team. In Philadelphia, Prism obtained rights to telecast 76'ers away games under similar circumstances. While Prism owned the rights to all home games of the 76'ers, the Philadelphia broadcasters lost interest in carrying the team's away games in recent years. Only one station was willing to purchase the game rights, and it offered a price deemed unacceptably low by the team's owner. In response, the owner approached Rainbow's Prism service and solicited a bid for the game rights. Prism and the 76'ers were able to reach an agreement.^{23/}

Recently, as the Fox network has expanded, broadcast interest in sports programming has declined even further. Formerly-independent stations that are now Fox affiliates, which heretofore have carried some of the sports programming available on broadcast television, are finding it more and more difficult to clear sporting events as the network expands its programming line-ups. In Boston, for example, the Fox affiliate, which is owned by the Celtics, was forced by the network to cut eleven of the Celtics' home games it planned to broadcast live this season. So that viewers would have access to these games on a live basis, the Celtics, through SportsChannel New England, made them

^{23/} The 76'ers games currently are exhibited on a combination of broadcast, basic and premium cable channels. None of the games are shown on pay-per-view. Cf. Notice at ¶ 17 (requesting information on the pay-per-view package sold by the 76'ers).

available to cable operators. But for the availability of a cable outlet, these games would have been unavailable live.

C. CABLE PROGRAMMERS HAVE OFFERED TEAM OWNERS PROFITABLE OPPORTUNITIES TO TELECAST HOME GAMES FOR THE FIRST TIME

Many of the decisions affecting the telecasting of sports programming are necessarily made by team owners and sports rights holders, and not by cable programmers or broadcasters. In a legitimate effort to maximize their revenues, team owners have sometimes imposed limitations on both broadcast and cable carriage of their games.^{24/} Because some owners fear that ticket sales could diminish as a result of televised coverage, they historically have been averse to granting the rights to telecast home games. With the growth of cable sports programming services, however, owners have found a profitable television outlet for such games.

Out of concern for gate revenues, team owners have frequently decided not to sell the rights to home games to broadcasters.^{25/} Such a business determination has been made in many of the markets served by Rainbow's SportsChannels. For example, this year, the Cleveland Cavaliers, Philadelphia Flyers and 76'ers, Miami Heat, and Chicago Bulls have not permitted any

^{24/} Rainbow agrees with the Commission's assumption that sports leagues, teams, universities and conferences generally seek to maximize their net revenues. See Notice at ¶ 9. Universities and professional sports without large followings also seek to maximize their exposure.

^{25/} As described above. among the earliest cable sports

of their home games to be broadcast. In San Francisco, the Giants, the A's, and the Warriors limit broadcasters to carriage primarily of away games. The Cincinnati Reds, Cleveland Indians, and San Jose Sharks permit only a handful of home games on broadcast television.

Where team owners have refused to sell exhibition rights to broadcasters, they are increasingly willing to grant such rights to cable programmers. Because games televised on cable are available to, at most, 60 percent of all households, cable provides owners with an outlet for home games that alleviates any concerns they may have about gate revenues. Cable carriage of home games, while obviously not accessible to non-subscribers.

broadcast television.^{26/} For the current and immediately past seasons, however, he has allowed SportsChannel Chicago to televise the team's home play-off games, but only on a pay-per-view basis to alleviate his concerns about diminished box office revenues.

SportsChannels in the San Francisco, New York and Philadelphia markets have assented to similar limitations on game coverage in response to team owners' fears of lost gate revenues. The Giants and the A's initially requested SportsChannel to show their games on premium channels. While the Warriors permit carriage of their games as part of a tier, they reserve the right to cancel their contract in the future if SportsChannel is delivered as part of basic service or a similar highly-penetrating tier. In New York, SportsChannel's agreement with the Mets limits the number of games that can be carried on basic. While SportsChannel has the option of placing additional games on basic, it will pay a substantial premium to the Mets in order to do so. In Philadelphia, home games of the 76'ers and the Flyers must be shown on Prism, a premium service, rather than on SportsChannel Philadelphia, which is available as a basic service.

^{26/} From 1981 through 1985, SportsVision (the predecessor of SportsChannel Chicago) exhibited ten Blackhawks home games. When SportsChannel became a basic cable service in 1986, it was permitted to telecast only the team's away games.

**III. ARTIFICIALLY RESERVING SPORTS PROGRAMMING FOR ONE MEDIUM
WILL DISSERVE THE PUBLIC INTEREST**

particularly true, given the advantages conferred upon broadcasters by the 1992 Cable Act.^{29/} Reserving certain games for broadcast exhibition is more likely to reduce the quantity of programming available to consumers rather than enhance it. Local broadcasters have often demonstrated a lack of interest in sports programming, even when it is clearly offered to them.^{30/} Given this lack of interest, barring cable programmers from bidding for certain games would simply make those games unavailable for television viewing.^{31/}

Perhaps more significantly, the quality and diversity of sports programming and sporting events themselves would diminish if games were put off-limits to cable programmers. Sports teams depend heavily on media income for their viability and on media exposure for their visibility. Cable revenues, in particular, have funded team growth and efforts to support new expansion

^{29/} See supra, pp. 8-9. Moreover, any policy setting aside programming for one medium or giving that medium preferential access to programming raises serious constitutional issues. By favoring one class of speakers over another, such a policy could violate the First Amendment. The policy could also constitute an illegal taking under the Fifth Amendment. Furthermore, a set aside policy would involve complicated business questions, such as whether the set aside constitutes a right of first refusal or what price must be paid for the programming rights.

^{30/} See supra, pp. 14-18.

^{31/} If games are to be reserved for broadcasters in a community, broadcasters should be required to purchase the rights to those games at a market rate. If broadcasters can deprive cable programmers of events without being required to exhibit those events themselves, consumers will lose out on programming that would otherwise be available on cable and team owners and colleges will be deprived of revenues that they would otherwise obtain from cable programmers.

teams. If teams were unable to sell certain games to cable programmers, the value of the programmers' packages in many instances would decrease. Particularly if broadcasters did not then purchase the reserved rights at competitive market prices, as is likely, teams would end up with substantially less revenue than if broadcasters and cable programmers competed fairly for exhibition rights. Teams would have less money to fund growth, and areas without sports teams would have fewer resources to put on the table to attract expansion teams.

Even if broadcasters did decide to purchase their reserved rights, both the quantity and quality of sports programming could